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OFFICE OF GENERAL COUNSEL

M E M O R A N D U M

TO: Chief, Dockets Division

FROM: Associate General Counsel, Litigation Division

SUBJECT: PageMart, Inc. v. FCC & USA, No. 94-1282, PageMart, Inc. v. FCC, No. 94-1283, Freeman Engineering Associates, Inc. v. FCC, No. 94-1286 and Advanced Cordless Technologies, Inc. v. FCC & USA, No. 94-1296. Filing of two new Notices of Appeal and two new Petitions for Review filed in the United States Court of Appeals for the D.C. Circuit.

DATE: April 5, 1994

Docket No(s). GEN 90-314 and ET 92-100

File No(s). RM-7617, RM-7760, RM-7782,
RM-7860, RM-7977, RM-7978,
RM-7979, RM-7980, PP-4, PP-36,
PP-37, PP-79 and PP-80

This is to advise you that on March 30, 1994, PageMart, Inc., filed both a Section 402(b) Notice of Appeal and a Section 402(a) Petition for Review, that on April 1, 1994, Freeman Engineering Associates, Inc., filed a Section 402(b) Notice of Appeal and that on April 4, 1994, Advanced Cordless Technologies, Inc., filed a Section 402(a) Petition for Review in the United States Court of Appeals for the District of Circuit. The FCC decision is: In the Matter of Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, FCC 94-30, released March 4, 1994

Challenge to the Commission's grant of a pioneer's preference to Mobile Telecommunications Technologies Corporation for a license for the commercial provision of personal communications services (PCS).

Due to a change in the Communications Act, it will not be necessary to notify the parties of this filing.

The Court has docketed these cases as Nos. 94-1282, 94-1283, 94-1286 and 94-1296 and the attorney assigned to handle the litigation of these cases is James Carr.


Daniel M. Armstrong

cc: General Counsel
Office of Public Affairs
Shepard's Citations

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PAGEMART, INC.)
Petitioner,)
v.)
FEDERAL COMMUNICATIONS COMMISSION)
and UNITED STATES OF AMERICA,)
Respondents.)

No. 94-1282

Filed: 3/30/94

PETITION FOR REVIEW

PageMart, Inc., ("PageMart") by its attorneys, petitions this Court for review of the decision of the Federal Communications Commission ("FCC"), granting a "pioneer's preference" to the Mobile Telecommunication Technologies Corporation ("Mtel") in Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket 90-314 and ET Docket 92-100, Memorandum Opinion and Order, FCC 94-30, released March 4, 1994 ("MO&O"). A copy of the FCC's foregoing decision is attached as Appendix A.

The Court has jurisdiction over this appeal under 28 U.S.C. § 2342 and 47 U.S.C. § 402(a). Venue is proper under 28 U.S.C. § 2343. PageMart is a provider of paging and other advanced telecommunications services and competes directly or through subsidiaries with the service proposed by Mtel. PageMart will thus be adversely affected by the grant of a pioneer's preference to Mtel, and has standing to appeal under 47 U.S.C. § 402(a) and Rule 15 of the Federal Rules of Appellate Procedure.

PageMart plans to show that the FCC's decision in the MO&O (1) was arbitrary and capricious and not supported by substantial evidence; (2) violated the Communications Act and Administrative Procedure Act; (3) represented unreasoned decisionmaking; and (4) represented an abuse of discretion.

PageMart requests that the MO&O be vacated insofar as it grants Mtel's request for a pioneer's preference, and that the case be remanded to the FCC for further proceedings.

Respectfully submitted,

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PageMart, Inc.

March 30, 1994

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PAGEMART, INC.)
Appellant,)
v.)
FEDERAL COMMUNICATIONS COMMISSION)
Appellee.)

Mar 31 3 07 PM '94

No. 94-1283
Filed: 3/30/94

NOTICE OF APPEAL

PageMart, Inc., ("PageMart") by its attorneys, hereby gives notice that it appeals from the decision of the Federal Communications Commission ("FCC"), granting a "pioneer's preference" to the Mobile Telecommunication Technologies Corporation ("Mtel") in Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket 90-314 and ET Docket 92-100, Memorandum Opinion and Order, FCC 94-30, released March 4, 1994 ("MO&O"). A copy of the FCC's foregoing decision is attached as Appendix A.

The Court has jurisdiction over this appeal under 47 U.S.C. 402(b), which governs the grant or denial of radio licenses and actions ancillary thereto. PageMart is a provider of paging and other advanced telecommunications services which compete directly or through subsidiaries with the service proposed by Mtel. PageMart will thus be adversely affected by the grant of a pioneer's preference to Mtel, and has standing to appeal under 47 U.S.C. § 402(b)(6).

PageMart plans to show that the FCC's decision (1) was arbitrary and capricious and not supported by substantial evidence; (2) violated the Communications Act and Administrative Procedure Act; (3) represented unreasoned decisionmaking; and (4) represented an abuse of discretion.

PageMart requests that the MO&O be vacated insofar as it grants Mtel's request for a pioneer's preference, and that the case be remanded to the FCC for further proceedings.

Respectfully submitted,

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Attorneys for Appellant
PageMart, Inc.

March 30, 1994

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Freeman Engineering
Associates, Inc.,

Appellant

v.

Federal Communications
Commission,

Appellee

) Case No. 94-1286
)
) Filed: 4/1/94
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)
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Notice of Appeal

Freeman Engineering Associates, Inc. ("Freeman"), by its attorneys and pursuant to Sections 402(b)(1) and 402(b)(6) of the Communications Act of 1934, as amended ("the Act"), 47 U.S.C. §§ 402(b)(1) and 402(b)(6), hereby appeals the decisions of the Federal Communications Commission ("FCC"), as set forth in First Report and Order (GEN Docket No. 90-314, ET Docket No. 92-100), FCC 93-329, released July 23, 1993 ("R&O") and Memorandum Opinion and Order (GEN Docket No. 90-314, ET Docket No. 92-100), FCC 94-30, released March 4, 1994 ("MO&O") (copies attached), insofar as they: a) granted Mobile Telecommunications Technologies Corporation ("Mtel") a pioneer's preference for a nationwide license for the commercial provision of Personal Communications Services ("PCS") in the 900 MHz frequency band; and b) denied Freeman's request for a 900 MHz frequency band PCS pioneer's

preference.¹ In support hereof, the following is shown:

1. In the R&O and MO&O, the FCC collectively: a) adopted certain Rules to govern the provision of commercial PCS in the 900 MHz frequency band; b) awarded Mtel a pioneer's preference for a nationwide 900 MHz band PCS license; c) denied the seventeen remaining requests for pioneer's preferences (including the one filed by Freeman) for 900 MHz band PCS; and d) held that the procedures for awarding pioneer's preferences without a hearing are consistent with the requirements of Section 309 of the Act, 47 U.S.C. § 309, and the Administrative Procedure Act, 5 U.S.C. § 551 et. seq. ("the APA").

2. The FCC's procedures for the award of pioneer's preferences are set forth in Section 1.402 of the FCC's Rules, 47 C.F.R. § 1.402. Under Section 1.402(d) of the FCC's Rules,

¹ The R&O and the MO&O were issued in a rulemaking proceeding in GEN Docket No. 90-314, ET Docket No. 92-100, and both adopted rules for the commercial licensing of 900 MHz band PCS service and disposed of all pending requests for pioneer's preferences for commercial 900 MHz band PCS systems. This Court has jurisdiction over cases brought under both Section 402(a) and Section 402(b) of the Act. These provisions of the Act are usually mutually exclusive, but in some cases, as here, the subject matter of the FCC action may arguably be subject to either section of the Act. This notice of appeal is timely filed in either case. The Court has held that under these circumstances, when no party will be prejudiced thereby, it will treat a notice of appeal filed under Section 402(b) of the Act as a petition for review under Section 402(a) of the Act if Section 402(a) of the Act is found to be applicable. Capital Cities Communications, Inc. v. FCC, 554 F.2d 1135, 1136 n.1 (D.C. Cir. 1976). In any event, judicial review is proper in this case under Section 402(b) of the Act because the grant or denial of a pioneer's preference constitutes an adjudication. Adams Telecom, Inc. v. FCC, 997 F.2d 955 (D.C. Cir. 1993).

47 C.F.R. § 1.402(d), the grant of a pioneer's preference effectively constitutes the grant, without a hearing, of a commercial radio station authorization.² Thus, the denial of a request for pioneer's preference constitutes the denial of an application for a construction permit or station license within the meaning of Section 402(b)(1) of the Act.

3. The FCC's action in denying Freeman's request for a pioneer's preference was: a) arbitrary, capricious and an abuse of discretion; b) inconsistent with the requirements of 47 C.F.R. § 1.402; c) inconsistent with the requirements of Section 309 of the Act; and d) inconsistent with the requirements of the APA.

4. With respect to the award to Mtel, the FCC's procedures for the award of pioneer's preferences without a hearing violate Section 309 of the Act, as interpreted by the United States Supreme Court in Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945) and United States v. Storer Broadcasting Co., 351 U.S. 192 (1956), and the APA. The FCC's award of a pioneer's preference to Mtel is invalid, and should be set aside, because the pioneer's preference award procedures violate Section 309 of the Act and the APA.³

² 47 C.F.R. § 1.402(d) states that "[i]f awarded, the pioneer's preference will provide that the preference applicant's application for a construction permit or license will not be subject to mutually exclusive applications."

³ For example, the number of commercial radio station licenses serving a given geographic area is a function of the number of radio channels or frequency blocks allocated by the FCC for the provision of service in that given geographic

5. Freeman is aggrieved, and its interests adversely affected, by the FCC's action in granting Mtel a pioneer's preference because the procedure described in footnote 3 would have contributed to the FCC's denial of Freeman's request for a pioneer's preference.

6. Jurisdiction and venue reside in this Court under Section 402(b) of the Act, 47 U.S.C. § 402(b).

7. Freeman previously sought judicial review in this Court, in Case Nos. 93-1519 and 93-1520, of the FCC's award of a pioneer's preference to Mtel. In a decision dated March 15, 1994, this Court dismissed Case Nos. 93-1519 and 93-1520 as prematurely filed in view of the fact that Freeman had also concurrently filed a petition with the FCC requesting reconsideration of the denial of Freeman's request for a pioneer's preference. In dismissing those cases, this Court

area. The number of channels or frequency blocks is always a finite number and, as a result, only a finite number of licensees can be authorized to serve that area. Not all commercial radio station licenses for the provision of service to a given geographic area will be awarded based upon the grant of pioneer's preferences. In view of the finite number of channels (and hence the finite number of licensees), as a practical matter the FCC cannot grant a pioneer's preference to every applicant whose proposal complies with the requirements of Section 1.402 of the Rules. As a further practical matter, the FCC is essentially required to internally determine (i.e., without notice to the public) the maximum number of pioneer's preferences it desires to award for any given radio service, and to internally perform some form of de facto comparative analysis among the competing applications to decide which pioneer's preference application(s) to grant. The fact that the pioneer's preference award procedures set forth in Section 1.402 of the FCC's Rules foreseeably lend themselves to these types of de facto comparative analyses render the procedures unlawful under Section 309 of the Act and the APA.

made clear that "[w]hen the agency acts upon the petition for reconsideration, Freeman may timely seek judicial review of any part of its final order," including the award of a pioneer's preference to Mtel. BellSouth Corporation v. FCC, Case No. 93-1518 (and consolidated cases), slip op., pg. 5 (D.C. Cir. March 15, 1994) (per curiam).


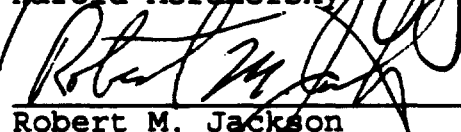
8. Freeman requests that the FCC's action be vacated insofar as it denied Freeman's request for a pioneer's preference, and the case remanded to the FCC for further proceedings. In the alternative, Freeman requests that the FCC's action be vacated insofar as it granted Mtel's request for a pioneer's preference, that the FCC's procedures for the award of pioneer's preferences be declared unlawful under Section 309 of the Act and the APA, and that the case be remanded to the FCC for further proceedings.

Respectfully submitted,

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By:


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Its Attorneys

Dated: April 1, 1994

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Advanced Cordless
Technologies, Inc.,

Petitioner,

v.

Federal Communications
Commission,

Respondent.

No. 94-11296
Filed: 4/4/94

PETITION FOR REVIEW

Advanced Cordless Technologies, Inc. (Petitioner) petitions this Court to review the Memorandum Opinion and Order released March 4, 1994 by the Federal Communications Commission (FCC or Respondent), slip opinion, FCC 94-30, attached (the FCC Decision).

This petition is filed pursuant to 47 U.S.C. §402(a) since it relates to an award of a pioneer's preference which is not the grant of a license. If this Court determines that the award of a pioneer's preference is for jurisdictional purposes the equivalent of a grant of a license, the Petitioner requests that this petition for review be accepted as a notice of appeal pursuant to 47 U.S.C. §402(b).

In the FCC Decision, the agency denied Petitioner's petition for reconsideration of the FCC's First Report and Order, reported at FCC Rcd. 7162 (1992), relative to so-called narrowband Personal Communications Services in which the FCC granted a pioneer's preference to Mobile Communications Technologies, Inc. and denied a pioneer's preference to the Petitioner.

In the instant petition for review, we shall argue to this

Court that the FCC Decision is arbitrary and capricious, does not constitute reasoned agency decision-making and otherwise is unlawful.

We request relief from this Court to reverse and set aside the FCC Decision, and remand the case to the FCC for further proceedings.

Respectfully submitted,



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April 4, 1994